

DEPARTMENT OF STATE REVENUE

**LETTER OF FINDING NUMBER 97-0398 AND 97-0399
Sales And Use Tax
For Period 1993, 1994, 1995**

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Sales/Use Tax – Freight Charges

Authority: IC 6-2.5-2-1

Taxpayer protested a proposed assessment of sales tax on freight charges.

II. Proposed Assessment – Validity

Authority: IC 6-8.1-5-1(a)

Taxpayer protested a proposed assessment on the purchase of seeding and sodding materials.

III. Sales/Use Tax – Purchase of tangible personal property to improve real estate

Authority: IC 6-2.5-4-9

Taxpayer protested proposed assessment of sales/use tax on the purchase of a pond liner.

IV. Penalty

Authority: IC 6-8.1-10-2.1

Taxpayer protested the imposition of a ten percent penalty on the proposed assessment.

STATEMENT OF FACTS

The administrative hearing consolidated the two audits (97-0398 and 97-0399). There are two separate corporations here, however, the corporations are sisters as they have common shareholders, officers and interest. At the hearing it was the taxpayer position that there was no protest as to the proposed assessment under Docket No. 97-0399. Thus this Letter of Finding shall address only the issues raised in the protest docketed as No. 97-0398.

Taxpayer is the owner of a golf club. The enterprise includes not only the golf club but also a residential development around the club. During the year 1993 taxpayer was constructing the course and club. The record is not totally clear but it appears as if taxpayer acted as its own general contractor, subletting the actual work to others. At times taxpayer purchased tangible personal property to be incorporated into the project. The purchases at protest are a freight charges for sod, seeding and sodding material and a liner for a pond.

I. Freight Charges

DISCUSSION

Taxpayer purchased sod from a company in Arkansas. According to the audit report taxpayer paid freight charges to the transportation companies that delivered the sod. The proposed assessment of sales tax seems to be based upon a theory that involves the purchase of tangible personal property and transportation of same as contemplated by 45 IAC 2.2-4-3(b). If such is the case the application of said regulation is flawed. The regulation addresses the circumstance where the vendor of tangible personal property arranges or otherwise provides for the delivery of goods to a vendee. This is not the case here. Taxpayer purchased sod, then in a separate transaction, with a carrier of freight not a seller of sod, contracts to have the sod delivered to the golf course for placement.

FINDING

Taxpayer's protest is sustained.

II. Validity of a Proposed Assessment

DISCUSSION

Taxpayer purchased seed, fertilizer, mulch, straw and the like from a company that also provided the work to place the seed; mulch, feed and cover same. All this may have been done pursuant to a firm fixed price contract. This seems to be taxpayer's position. The audit report indicates the proposed assessment was limited to items not provided through a firm fixed price contract.

At the hearing the taxpayer did not come forward with any supporting evidence to contradict the proposed assessment. Therefore, taxpayer has failed to carry its burden of going forward with evidence to overcome a prima facie assessment.

FINDING

Taxpayer's protest is denied.

III. Sales/Use Tax – Purchase of tangible personal property to improve real estate

DISCUSSION

Taxpayer alleges that the pond liner is an improvement to real estate, thus there is no liability for sales/use tax. This proposition contradicts IC 6-2.5-4-9 and 45 IAC 2.2-3-8. It is clear both citations impose a sales/use tax on tangible personal property acquired to convert to real property.

FINDING

Taxpayer's protest is denied.

III. Penalty

DISCUSSION

It does not appear that taxpayer made any attempt to accrue use tax on any taxable purchases when Indiana sales tax was not changed.

FINDING

Taxpayer's protest of the negligence penalty is denied.